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In the Supreme Court

of the United States

OCTOBER TERM, 1951 — No. 414

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE, DILLEHAY, JR., Deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE, and BRIEF AMICUS CURIAE.

B. A. GREEN,
1003 Corbett Building,
Portland, Oregon,
Amicus Curiae.

5-52

STEVENS-NESS LAW PUB. CO.

In the Supreme Court

of the United States

OCTOBER TERM, 1951 — No. 414

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE, DILLEHAY, JR., Deceased,

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PETITION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes now *B. A. Green,* an attorney duly admitted to practice before this honorable court, and respectfully petitions this honorable court for leave to file the accompanying Brief Amicus Curiae in support of plaintiff's Petition for rehearing.

Your petitioner is, and for many years has been, counsel for numerous labor organizations in the State of Oregon, including the Oregon State Federation of Labor, the Marine Engineers Beneficial Association, Local No. 41, Portland, Oregon, affiliated with the National Marine Engineers Beneficial Association, the National Organization of Masters, Mates & Pilots, Local No. 17, Portland, Oregon, the Inlandboatment's Union of the Pacific, Columbia River Division, Portland, Oregon, and the Portland branch of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association; that said labor organizations are composed of many members and include many members employed in the maritime industry; that said members are, from time to time, employed by the United States of America on public vessels owned and operated by the Government; that said labor organizations are, therefore, vitally interested in the issues involved in this cause and therefore your petitioner seeks leave to file a brief amicus curiae in support of the position taken by counsel for the plaintiff herein.

That your petitioner has been notified by counsel for the plaintiff in this cause that a petition for rehearing will be filed with this honorable court; that Abraham E. Freedman, counsel for the plaintiff in this cause, has consented to the filing of a brief amicus curiae but time does not permit the obtaining of counsel's written consent to attach to this Petition; that your petitioner is informed and believes and therefore alleges that other counsel proposing to file briefs amicus curiae in this

cause have attempted to obtain the consent to filing amicus curiae briefs from Leavenworth Colby, counsel for the United States of America, and that such consent has been refused; that time does not permit your petitioner's obtaining said counsel's written consent or written refusal of consent to the filing of such brief.

That your petitioner has read the original brief filed by counsel for plaintiff in this cause and your petitioner concurs in and endorses the arguments and reasons therein set forth in support of plaintiff's position.

That your petitioner has read the majority and dissenting opinions of this court in this cause, which opinions were announced on May 26, 1952; that your petitioner respectfully submits that the result reached in the majority opinion is contrary to and in conflict with long established legal principles and is contrary to the purpose and intent of the federal legislation involved, to-wit, the Federal Employees Compensation Act, 5 U.S.C., Sec. 751 et seq., and the Public Vessels Act of 1925, 46 U.S.C., Sec. 781 et seq.; that under said majority opinion the rights of many persons employed in the maritime industry on public vessels owned and operated by the United States of America are prejudiced and that, therefore, the labor organizations hereinabove referred to and whom your petitioner represents, are interested in obtaining a reconsideration of the issues involved in this caused by this honorable court.

That this Petition is filed in good faith and not for the purpose of delay and, in my opinion, is well founded in law and fact.

WHEREFORE, your petitioner respectfully petitions this honorable court for leave to file the accompanying Brief Amicus Curiae, that petitioner's Petition for Rehearing be allowed, and that the judgment of this court announced May 26, 1952, be reversed.

B. A. Green
Petitioner

STATE OF OREGON)
) ss.
County of Multnomah)

I, *B. A. Green,* being first duly sworn, depose and say: that I am the petitioner in the foregoing Petition; that I have read the same, know the contents thereof, and that the same is true, as I verily believe.

B. A. Green

Subscribed and sworn to before me, a notary public, on this, the 5th day of June, 1952.

Donald S. Richardson
Notary Public for Oregon
My commission expires May 31, 1954

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vs.

THE UNITED STATES OF AMERICA.

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

As stated in the petition for leave to file this brief, the undersigned attorney is counsel for numerous labor organizations in the state of Oregon, including the Oregon State Federation of Labor, the Marine Engineers Beneficial Association, Local No. 41, Portland, Oregon, affiliated with the National Marine Engineers Beneficial Association, the National Organization of Masters, Mates and Pilots, Local No. 17, Portland, Oregon, the Inlandboatmen's Union of the Pacific, Columbia River

Division, Portland, Oregon, and the Portland branch of the Pacific Coast Marine Firemen, Oilers, Wipers and Watertenders Association. These organizations include many members who are employed in the maritime industry in interstate and foreign commerce. As is well known, the nature of such maritime employment is such that at times such employees are employed by private shipping concerns and at other times by the Government of the United States, as was the plaintiff's decedent in this cause.

While the various labor organizations representing maritime employees do not have collective bargaining agreements with the United States Government, wages, hours and working conditions observed by the Government of the United States as such an employer tend to follow the trend of such conditions achieved by the labor organizations and incorporated in collective bargaining agreements with private maritime employers. Also, it is obvious that these labor organizations have a vital interest in the protection and preservation of the rights of their members and others who are on occasions employed by the United States in capacities similar to that of the plaintiff's decedent herein.

Under the majority opinion in this case, such employees are deprived of a vital right which had heretofore been accorded to them and which had been recognized by many courts. That is the right to prosecute suits for damages for injuries or death under the Public Vessels Act, 46 U.S.C., sec. 781. We submit that this deprivation is contrary to well established principles of

law, and also directly contrary to the intent of Congress, as expressed in the 1949 amendments to the Federal Employees' Compensation Act and, therefore, that plaintiff's petition for rehearing herein should be allowed and the present judgment of this court should be reversed.

ARGUMENT

I.

Prior to 1949, federal employees were not limited to compensation under the Federal Employees' Compensation Act, but their rights under such Act were elective only.

Brooks v. United States, 337 U.S. 49, 93 L. Ed. 1200.
Johnson v. United States, 186 F. 2d 120.
Gibbs v. United States, 94 F. Supp. 586.
Panama R. Co. v. Minnix, 282 F. 47.
Panama R. Co. v. Strobel, 282 F. 582.
Payne v. Cohlmeyer, 275 F. 803.
Marine v. United States, 65 F. Supp. 111, affirmed 155 F. 2d 456.
White v. United States, 77 F. Supp. 316.

This court, in *Brooks v. United States*, supra, recognized that an election of remedies was permitted under the Federal Employees' Compensation Act. At 93 L. Ed. 1204 the court stated:

> "Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, (citations)."

In the other cases above cited, the federal courts there held that federal employees have the right of elec-

tion either to accept compensation or to sue the Government or the appropriate governmental agency under various statutes, wherein governmental immunity had been waived by Congress. In the instant case governmental immunity was waived by Congress by the enactment of the Public Vessels Act of 1925. Therefore, under existing case law prior to the instant decision, federal employees and their counsel were warranted in assuming that the right of election existed.

II.

The 1949 amendments to the Federal Employees' Compensation Act did not make compensation the exclusive remedy for seamen employed by the Government, and this court should not construe the remedy as exclusive when Congress has not done so.

95 Cong. Rec. 13608.
Brooks v. United States, supra.

It is apparent that the 1949 amendments to the Federal Employees' Compensation Act made compensation the exclusive remedy for federal employees other than seamen. However, the pertinent amendment includes the following provision:

> " . . . provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel." 5 U.S.C. sec. 757 (b).

This proviso is found at the end of the subparagraph which did make compensation the exclusive remedy for other federal employees. The present majority opinion in this cause entirely vitiates the effect of this reserva-

tion made by Congress and renders the proviso entirely meaningless. It is, of course, not to be assumed that Congress intended to perform a futile act by including the reservation with respect to seamen. Also, an examination of the legislative history surrounding the amendments reveals that the intent of Congress was to preserve the seamen's right of election. The reservation amendments were proposed by Senator Morse, of Oregon, and in presenting the modification Senator Morse stated:

> "Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and the Public Vessels Act. . . . I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress . . ." 95 Cong. Rec. 13608.

The modification was agreed to by Senator Douglas, the senator in charge of the bill. 95 Cong. Rec. 13609. We submit that the foregoing establishes a clear recognition by Congress that seamen had the right of election and the congressional intent to preserve that right.

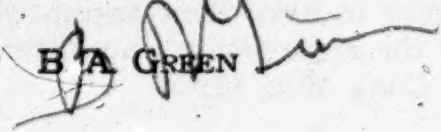
Inasmuch as Congress did not express an intent to make compensation the exclusive remedy for seamen but, on the contrary, expressed its intent to preserve the election right, the court certainly should not judicially declare that the compensation remedy is exclusive. As stated by this court in *Brooks v. United States*, supra, at 93 L. Ed. 1204:

"We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

CONCLUSION

In conclusion, we submit that in order to preserve in effect established rights of seamen under earlier federal court decisions, and in order to give effect tc the announced intention of the Congress of the United States, as expressed in the 1949 amendments to the Federal Employees' Compensation Act, plaintiff's petition for rehearing should be allowed and the present judgment of this court should be reversed.

Respectfully submitted,



B. A. GREEN

STATE OF OREGON,)
) ss.
County of Multnomah,)

I, B. A. Green, being first duly sworn, depose and say:

That I served the within petition for leave to file amicus curiae brief and amicus curiae brief upon Abraham E. Freedman, counsel for plaintiff, and Leavenworth Colby, United States Attorney in charge of admiralty, of attorneys for the defendant, by depositing in the United States Postoffice at Portland, Oregon, on the 6th day of June, 1952, a full, true and correct copy thereof, addressed to the said Abraham E. Freedman, Attorney at Law, 1415 Walnut Street, Philadelphia, Pennsylvania, and to the said Leavenworth Colby, United States Attorney, Attorney General's Office, Washington, D. C., and prepaying the postage thereon.

B. A. GREEN

Subscribed and sworn to before me this 6th day of June, 1952.

DONALD S. RICHARDSON
Notary Public for Oregon
My commission expires May 31, 1954